

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JESUS ARGELO MACHIN,

Plaintiff,

vs.

OFFICER COSTAS; METROPOLITAN
CORRECTIONAL CENTER; DOES 1-10,

Defendants.

Civil No. 09-444 IEG (WVG)

**ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS AND
FOR SUMMARY JUDGMENT
PURSUANT TO
FED.R.CIV.P. 12(b)(6)
AND FED.R.CIV.P. 56(c)**

[Doc. No. 9]

I. Procedural Background

Jesus Argelio Machin (“Plaintiff”), a former criminal pretrial detainee at the Metropolitan Correctional Center (“MCC”) in San Diego, is proceeding in pro se and *in forma pauperis* with this civil action, which he filed pursuant to 42 U.S.C. § 1983.

Plaintiff claims to have been injured on August 11, 2005 at MCC while he was on kitchen duty and under the supervision of Defendant Kevin Costa, erroneously sued as “Officer Costas.”¹ Plaintiff claims Costa violated his right to be free from cruel and unusual punishment, intentionally inflicted severe mental and emotional distress upon him and was negligent in

¹ Plaintiff’s Complaint names as Defendants Officer Costas, the MCC and John Does 1-10. The only person served with the Complaint and summons, and thus, the only party moving to dismiss and/or for summary judgment is Officer Kevin Costa. See Compl. at 1, 2.

1 violation of the Eighth Amendment and several provisions of the California Penal Code.
 2 (Compl. at 3-4.) Plaintiff seeks injunctive relief in the form of a grand jury investigation as well
 3 as “reasonable fees” and punitive damages. (*Id.* at 5.)

4 On July 31, 2009, Defendant Costa filed a Motion to Dismiss pursuant to FED.R.CIV.P.
 5 12(b)(6) and for Summary Judgment pursuant to FED.R.CIV.P. 56 [Doc. No. 9]. On August 7,
 6 2009, in an abundance of caution, the Court provided Plaintiff with written notice of the
 7 requirements for opposing summary judgment pursuant to *Rand v. Rowland*, 154 F.3d 952 (9th
 8 Cir. 1998) (en banc) and *Klingele v. Eikenberry*, 849 F.2d 409 (9th Cir. 1988) [Doc. No. 10],
 9 despite the fact that he was not incarcerated at the time he filed this action, nor does the docket
 10 reflect he is currently incarcerated. Nevertheless, Plaintiff has failed to file any Opposition.

11 **II. Proper Parties**

12 First, the Court notes that Plaintiff includes both the MCC and John Does 1-10 in the
 13 caption of his Complaint as Defendants. However, Plaintiff has not effected service upon the
 14 MCC, nor has he identified or served any of the Does. Because Plaintiff has failed to effect
 15 service of the summons and Complaint upon these purported Defendants, the Court has no
 16 personal jurisdiction over them and they are not considered parties to this action. *See*
 17 FED.R.CIV.P. 4(m); *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 350
 18 (1999) (“In the absence of service of process (or waiver of service by the defendant),” under
 19 FED.R.CIV.P. 4, “a court ordinarily may not exercise power over a party the complaint names
 20 as a defendant.”); *see also Omni Capital Int’l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104
 21 (1987) (“Before a ... court may exercise personal jurisdiction over a defendant, the procedural
 22 requirement of service of summons must be satisfied.”).

23 Thus, to the extent Plaintiff’s Complaint includes allegations against the MCC and John
 24 Does 1-10, the Court dismisses the action for insufficient service and lack of personal
 25 jurisdiction. *See* FED.R.CIV.P. 4(m); *Murphy Bros.*, 526 U.S. at 350; *Omni Capital*, 484 U.S.
 26 at 104.

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1 **III. Factual Background**

2 On August 11, 2005, Plaintiff was a criminal pretrial detainee at MCC. (Compl. at 3; 3
Def.'s Exs. A & B.) A few weeks before, Plaintiff was examined by MCC medical personnel, 4
who noted that while Plaintiff had undergone seven surgeries on his left thumb between 1982 5
and 1988, he was nevertheless "qualified for regular [work] duty." (Def.'s Ex. H.) On August 6
4, 2005, Plaintiff was assigned to work in the MCC kitchen under the supervision of Defendant 7
Costa, the Cook Supervisor. (Compl. at 3, 8; Defs.' Ex. D, Inmate Work Detail; Ex. E, Decl. 8
of Kevin A. Costa [hereafter "Costa Decl."] ¶ 2.) Plaintiff claims he was "comfortable ... 9
washing dishes," but Costa "transferred [him] to another line of work," even though Plaintiff 10
informed Costa of his previous surgeries. (Pl.'s Affidavit in Supp. of Compl. [hereafter "Pl.'s 11
Ex. A"] at 9.) Plaintiff claims Costa threatened to place him in the hole if he didn't follow 12
orders, so he "continue[d] to work with extreme caution." (*Id.*) Despite his caution, however, 13
Plaintiff claims "one of [his] co-worker[s] push[ed] a food cart," and it "collid[ed] with [his] left 14
hand and hit [his] left thumb," causing him "unimaginable pain." (*Id.*)

15 Plaintiff informed Costa he was in "great pain and ... need[ed] to see ... medical 16
personnel." (Pl.'s Ex. A.) Plaintiff alleges Costa "just told [him] to sit down." (*Id.*) After 17
"more than one hour," Plaintiff claims he "beg[ged]" Costa to take him to the "medical floor," 18
but Costa replied, "Your hand is not ... falling [off]," and that he would "bring [Plaintiff] to the 19
Dr. when [he] fel[t] like it." (*Id.*) Plaintiff claims he was injured at 11:45 a.m., and to have 20
waited two hours "in great pain" before Costa transported him to medical, (*id.*); however, the 21
MCC's medical records report Plaintiff was injured at 1:30 p.m. and transported to Health 22
Service at 2:40 p.m. (Def.'s Ex. F.)

23 Defendant Costa does not remember Plaintiff or the incident in the kitchen on August 11, 24
2005. (Def.'s Ex. E [hereafter "Costa Decl."] ¶ 3.) However, as both a Bureau of Prison's 25
("BOP") employee and a Cook Supervisor, Costa has been trained on BOP medical emergency 26
procedures. (*Id.* ¶¶ 8-9.) Costa claims that in an emergency, "such as when an inmate is 27
unconscious or is bleeding profusely, it is [his] custom and practice to push [his] body alarm" 28
and to "initiate preliminary first aid until medical personnel arrive." (*Id.* ¶ 10.) In non-

1 emergency situations, Costa “call[s] the Health Services Department,” and describes the incident
 2 to medical personnel” who ask him questions in order to assess the severity of injury and
 3 investigate whether any security concerns prevent Plaintiff’s transport to Health Services. (*Id.*
 4 ¶ 11.) If no security concerns exist, Costa calls an escort officer. (*Id.*) Costa claims he has “no
 5 control over when the escort officer reports to the kitchen,” but once one does, he “give[s] the
 6 officer the inmate’s work crew card, which contains the inmate’s key information and picture.”
 7 (*Id.*) Once an injured inmate is escorted to Health Services, Costa claims, as a Cook Supervisor,
 8 he has no further involvement in the inmate’s medical problem. (*Id.*) Thus, Costa asserts that
 9 while he does not recall Plaintiff or his injury, he “would not have been involved in giving [him]
 10 any medical care,” “would not have had any more interactions with him, unless he came back
 11 to work in the kitchen,” and would have had “no reason” to “delay[] reporting [Plaintiff’s] injury
 12 or assisting him in obtaining medical care.” (*Id.* ¶ 12.)

13 For his part, Plaintiff claims that once he arrived at Health Services on August 11, 2005,
 14 “one of the nurses look[ed] at his hand,” “gave [him] a pill,” and “put a bandage and wrap
 15 around [his] thumb,” before sending him back to his housing unit. (Pl.’s Ex. A.) Plaintiff alleges
 16 the medication “did not stop the pain.” (*Id.*) Plaintiff refers only once more to his thumb injury
 17 and Defendant Costa: on August 17, 2005, he claims to have been “recalled to work in the
 18 kitchen,” and threatened with seclusion if he did not follow orders. (*Id.*) Plaintiff claims he still
 19 suffered from pain and a swollen thumb, which he reported to “the employee of the facility.”
 20 (*Id.*) Plaintiff asserts that while he was “forced” to report for kitchen duty, he “just s[a]t in pain
 21 ... not able to do anything.” (*Id.*) Later on the same day Plaintiff claims to have been stuck in
 22 a hot elevator for two hours along with 24 other individuals, and alleges Defendant Costa “did
 23 not even use the radio in his possession to get help.” (*Id.*)

24 Dr. Debra Lucy, the Clinical Director of the Health Services at MCC, however, has
 25 submitted a sworn Declaration recounting Plaintiff’s medical treatment, as well as copies of the
 26 medical records which chronicle his care from the date of the incident, August 11, 2005, through
 27 December 9, 2005. (Def.’s Ex. G, I-Q, S-U.) According to Dr. Lucy, Plaintiff was first assessed
 28 by a physician’s assistant, Virgilio Camagay, in the Health Services Unit on August 11, 2005.

(Def.'s Ex. G ¶ 6; Def.'s Exs. F, J.) Camagay noted minimal swelling of Plaintiff's left thumb with a limited range of motion, no bruising, no rupture and no active bleeding. (Def.'s Ex. G ¶ 6.) An x-ray, taken of Plaintiff's left thumb that same day showed "no acute fracture," but did show Plaintiff had a "fusion" of the "metacarpophalangeal joint" as the result of previous surgeries as well as an implanted "plate and screws for stabilization." (*Id.*; *see also* Def.'s Ex. I "Radiological Consultation Request/Report" dated August 11, 2005.) Plaintiff was prescribed 800 mg of Ibuprofin three times a day to "reduce swelling and pain." (Def.'s Ex. G ¶ 6.)

On August 16, 2005, Plaintiff returned to Health Services complaining of increased pain and throbbing in his left thumb. (*Id.* ¶ 7; *see also* Def.'s Ex. K "Chronological Record of Medical Care" dated August 16, 2005.) Plaintiff's thumb was no longer swollen, but "redness measuring 3 mm was noted in the web between [his] thumb and index finger." (Def.'s Ex. G ¶ 7.) Plaintiff was prescribed an anti-steroidal medication, given a bandage and was referred to a physician. (*Id.*)

On August 25, 2005, Plaintiff again returned to Health Services complaining of "throbbing pain in his left thumb" radiating into his arm. (Def.'s Ex. L.) Plaintiff's thumb was again swollen and a blister was noted, as well as an abrasion, discharge and a bruise around the base of the thumb. (Def.'s Ex. G ¶ 8.) At this time, Plaintiff was "diagnosed with an infection," "administered an injection to combat the infection," "prescribed oral antibiotics," and had his wound dressed. (*Id.*) Another x-ray and lab tests were ordered. (*Id.*; *see also* Def.'s Exs. M, N.) Plaintiff's x-ray results did not differ from those taken on August 11, 2005. (Def.'s Ex. G at ¶ 8; Def.'s Ex. N.) Plaintiff's lab culture, taken on August 25, 2005 and released on August 27, 2005, confirmed he had a staph infection in his left hand wound, but "no MRSA [was] isolated." (Def.'s Ex. M.)

On August 26, 2005, Plaintiff returned to Health Services, and had removed the dressing from the day before. (Def.'s Ex. G ¶ 9, Def.'s Ex. L.) Dr. Lucy claims Plaintiff was directed not to remove the dressing because it could worsen his infection, which nevertheless showed signs of improvement—"no discharge, less swelling and less redness." (*Id.*) Plaintiff's hand was then soaked in betadine, a topical antiseptic. (*Id.*) Plaintiff was thereafter examined every day

1 in Health Services from August 26, 2005 through September 14, 2005, to “check the status of
 2 the infection.” (*Id.*) As of August 29, 2005, Plaintiff’s hand showed no “open areas” or
 3 drainage. (*Id.* ¶ 12.)

4 On August 26, 2005, Dr. Lucy also authorized Plaintiff’s referral to an orthopedic
 5 surgeon who specializes in hand surgery. (Def.’s Ex. G ¶ 10, Def.’s Ex. P.) Dr. Lucy claims she
 6 did not send the referral to the Utilization Review Committee’s (“URC”) because as Chair of the
 7 URC, she “knew the referral would be approved.” (Def.’s Ex. G ¶ 10.) Dr. Lucy claims this
 8 accelerated Plaintiff’s referral “by three to four weeks.” (*Id.*)

9 Plaintiff’s surgical referral was coordinated through the United States Marshal Service,
 10 which was responsible for providing an escort. (*Id.* ¶ 11.) On September 15, 2005, Plaintiff
 11 was examined by Dr. Jose Otero, an orthopedic surgeon at Alvarado Hospital, (*Id.* ¶¶ 11, 13;
 12 Def.’s Ex. O.) According to Dr. Lacy, Dr. Otero “diagnosed Plaintiff with nerve damage as a
 13 result of the previous surgeries,” and “recommended surgery to remove the hardware implanted
 14 during those surgeries.” (Def.’s Ex. G ¶ 13.)

15 On October 5, 2005, Dr. Otero performed surgery on Plaintiff’s left hand. (*Id.*, Def.’s Ex.
 16 Q.) During the surgery, Dr. Otero found a “rigid, severely scarred thumb, both on the dorsum
 17 and on the palmar side.” (Def.’s Ex. Q.) Otero removed a “plate and multiple screws,” although
 18 three screws broke as he was attempting to remove them, and the shafts had to be left in the
 19 bone. (*Id.*) Dr. Otero further noted severe scarring, tendon, nerve and tissue damage, some of
 20 which he attributed to “previous multiple infections.” (*Id.*) While “the extent of the preexisting
 21 damage limited some ... surgical options that would have otherwise been attempted,” (Def.’s Ex.
 22 G ¶ 13), Dr. Otero was able to repair a dislocated extensor pollicis longus tendon, perform
 23 neurolysis on some digital nerves and to use some soft tissue from the thenar eminence and palm
 24 to cover the nerves and isolate them from the heavily scarred skin. (Def.’s Ex. Q.) Afterwards,
 25 Otero applied a fiberglass cast “from the tip of the thumb to the elbow area in standard fashion.”
 26 (*Id.*) Dr. Otero’s operative notes indicate the procedure was “well tolerated” and Plaintiff was
 27 sent to recovery in satisfactory condition. (*Id.*)

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1 Plaintiff returned to Dr. Otero for a surgical follow-up consultation on October 21, 2005.
 2 (Def.'s Ex. G ¶ 14, Def.'s Ex. S.) Dr. Otero noted Plaintiff had "no complaints," and was "doing
 3 well." (Def.'s Ex. S.) Dr. Otero recommended a follow-up appointment in two weeks in order
 4 to remove Plaintiff's cast. (*Id.*) Dr. Lucy further claims Plaintiff was recommended for, and
 5 provided physical therapy "in house." (Def.'s Ex. G ¶ 14.)

6 On November 23, 2005, Dr. Lucy again referred Plaintiff to Dr. Otero because he
 7 continued to complain of pain in his left hand. (*Id.*, Def.'s Ex. T.) On December 9, 2005, Dr.
 8 Lucy claims Plaintiff was examined by Dr. Otero, who recommended that therapy continue and
 9 a return follow-up appointment in four weeks. (Def.'s Ex. G ¶ 14, Def.'s Ex. U.) However,
 10 Plaintiff was transferred from MCC prior to that time, and MCC was "no longer involved in
 11 [Plaintiff's] medical care." (Def.'s Ex. G ¶ 14.)

12 Plaintiff has attached to Complaint, however, copies of medical records post-dating his
 13 transfer from MCC which indicate an ongoing course of medical examinations, x-rays and
 14 treatment for his hand at both FMC Fort Worth and FCI Taft. *See Compl. Ex. B* [Doc. No. 1-2]
 15 at 60-69, [Doc. No. 1-1] at 1-30, 52-54, 56-80, 110-119.

16 IV. Defendants' Motion

17 A. FED.R.CIV.P. 12(b)(6) Standard of Review

18 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) "tests the legal
 19 sufficiency of a claim." *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). Because Rule
 20 12(b)(6) focuses on the "sufficiency" of a claim rather than the claim's substantive merits, "a
 21 court may [typically] look only at the face of the complaint to decide a motion to dismiss." *Van*
 22 *Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th Cir. 2002). Thus, when resolving
 23 a motion to dismiss for failure to state a claim, the court may not generally consider materials
 24 outside the pleadings, except for exhibits which are attached. *See FED.R.CIV.P. 10(c)* ("A copy
 25 of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.");
 26 *Schneider v. California Dept. of Corrections*, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998).

27 A motion to dismiss should be granted if a plaintiff's complaint fails to contain "enough
 28 facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S.

1 544, 570 (2007). “A claim has facial plausibility when the plaintiff pleads factual content that
 2 allows the court to draw the reasonable inference that the defendant is liable for the misconduct
 3 alleged.” *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S.Ct. 1937, 1949 (2009) (quoting *Twombly*, 550
 4 U.S. at 556, 570).

5 While allegations of material fact are accepted as true and construed in the light most
 6 favorable to the nonmoving party, *Cahill v. Liberty Mutual Ins. Co.*, 80 F.3d 336, 337-38 (9th
 7 Cir. 1996), the court need not accept as true generic legal conclusions, unwarranted deductions
 8 of fact or unreasonable inferences. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988
 9 (9th Cir. 2001); *Iqbal*, 129 S.Ct. at 1949 (“Threadbare recitals of the elements of a cause of
 10 action, supported by mere conclusory statements, do not suffice.”); *Twombly*, 550 U.S. at 555
 11 (on motion to dismiss court is “not bound to accept as true a legal conclusion couched as a
 12 factual allegation.”). “The pleading standard Rule 8 announces does not require ‘detailed factual
 13 allegations,’ but it demands more than an unadorned, the defendant-unlawfully-harmed-me
 14 accusation.” *Iqbal*, 129 S.Ct. at 1949 (quoting *Twombly*, 550 U.S. at 555).

15 Thus, “[w]hile legal conclusions can provide the framework of a complaint, they must
 16 be supported by factual allegations. When there are well-pleaded factual allegations, a court
 17 should assume their veracity and then decide whether they plausibly give rise to an entitlement
 18 to relief.” *Iqbal*, 129 S.Ct. at 1950. “The plausibility standard is not akin to a ‘probability
 19 requirement,’ but it asks for more than a sheer possibility that defendant has acted unlawfully.”
 20 *Id.* at 1949. Where a complaint pleads facts that are “merely consistent with” a defendant’s
 21 liability, it “stops short of the line between possibility and plausibility of ‘entitlement to relief.’”
 22 *Id.*; *Twombly*, 550 U.S. at 570 (when a plaintiff has not “nudged [his] claims across the line
 23 from conceivable to plausible, [his] complaint must be dismissed.”).

24 “In sum, for a complaint to survive a motion to dismiss, the non-conclusory ‘factual
 25 content,’ and reasonable inferences [drawn] from that content, must be plausibly suggestive of
 26 a claim entitling the plaintiff to relief.” *Moss v. United States Secret Service*, 572 F.3d 962, 969
 27 (9th Cir. 2009) (quoting *Iqbal*, 129 S. Ct. at 1949).

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1 **B. FED.R.CIV.P. 56 Standard of Review**

2 Summary judgment is proper where there is no genuine issue of material fact in dispute
 3 and the moving party has shown it is entitled to judgment as a matter of law. *Bias v. Moynihan*,
 4 508 F.3d 1212, 1218 (9th Cir. 2007) (citing FED.R.CIV.P. 56(c)).

5 Under summary judgment practice, the moving party always bears the initial
 6 responsibility of informing the district court of the basis for its motion, and identifying those
 7 portions of “the pleadings, depositions, answers to interrogatories, and admissions on file,
 8 together with the affidavits, if any,” which it believes demonstrate the absence of a genuine issue
 9 of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (quoting FED.R.CIV.P.
 10 56(c)); *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 883 (9th Cir. 1982). The “purpose of
 11 summary judgment is to ‘pierce the pleadings and to assess the proof in order to see whether
 12 there is a genuine need for trial.’” *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475
 13 U.S. 574, 587 (1986) (citations omitted).

14 If the moving party meets its initial responsibility, the burden then shifts to the
 15 nonmoving party to establish, beyond the pleadings, that there is a genuine issue for trial.
 16 *Celotex*, 477 U.S. at 324; *Bias*, 508 F.3d at 1218. To avoid summary judgment, the non-moving
 17 party is “required to present significant, probative evidence tending to support h[is] allegations,”
 18 *Bias*, 508 F.3d at 1218 (citations omitted), and must point to some evidence in the record that
 19 demonstrates “a genuine issue of material fact [which], with all reasonable inferences made in
 20 the plaintiff[]’s favor, could convince a reasonable jury to find for the plaintiff[].” *Reese v.*
 21 *Jefferson School Dist. No. 14J*, 208 F.3d 736, 738 (9th Cir. 2000) (citing FED.R.CIV.P. 56;
 22 *Celotex*, 477 U.S. at 323)); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).
 23 Thus, to “defeat a summary judgment motion ..., the non-moving party ‘may not rest upon the
 24 mere allegations or denials’ in the pleadings. FED.R.CIV.P. 56(e); *Berg v. Kincheloe*, 794 F.2d
 25 457, 459 (9th Cir. 1986) (opposing party cannot rest solely on conclusory allegations of fact or
 26 law). Instead, the non-moving party “must establish the existence of a genuine factual dispute
 27 on the basis of admissible evidence; bare allegations without evidentiary support are insufficient

28 t o s u r v i v e

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2 summary judgment.” *Estate of Tucker ex rel. Tucker v. Interscope Records, Inc.*, 515 F.3d 1019,
 3 1033 n.14 (9th Cir. 2008).

4 **C. Unopposed Summary Judgment**

5 This Court’s Local Rules further provide that “[i]f an opposing party fails to file papers
 6 in the manner required by Local Rule 7.1(e)(2), that failure may constitute a consent to the
 7 granting of a motion or other request for ruling by the court.” S.D. CAL. CIVLR 7.1(f)(3)(c).
 8 However, the court may not simply grant summary judgment because the nonmovant has failed
 9 to respond. *Martinez v. Stanford*, 323 F.3d 1178, 1182-83 (9th Cir. 2003) (discussing S.D. CAL.
 10 CIVLR 7.1(f)(3)(c)). Rather, the court must consider whether the movant’s papers are sufficient
 11 on their face to sustain summary judgment. *Id.* at 1183 (citing *Marshall v. Gates*, 44 F.3d 722,
 12 725 (9th Cir. 1995); *Henry v. Gill Industries, Inc.*, 983 F.2d 943, 950 (9th Cir. 1993) (“[T]he
 13 party opposing summary judgment is under no obligation to offer affidavits or any other
 14 materials in support of its opposition. Summary judgment may be resisted and must be denied
 15 on no other grounds than the movant has failed to meet its burden of demonstrating the absence
 16 of triable issues.”)).

17 Here, while Plaintiff has failed to oppose Defendant’s Motion, he has filed two affidavits,
 18 one in support of his Motion to Proceed *In Forma Pauperis* [Doc. No. 2], and one which is
 19 attached at Exhibit A to his Complaint, both which verify that the “contents of the complaint”
 20 and the declarations in his affidavit are true under penalty of perjury and in conformance with
 21 28 U.S.C. § 1746. *See* Compl. at 9. A verified complaint or motion may be used as an opposing
 22 affidavit under FED.R.CIV.P. 56. *Schroeder v. McDonald*, 55 F.3d 454, 460 (9th Cir. 1995)
 23 (complaint); *Johnson v. Meltzer*, 134 F.3d 1393, 1399-1400 (9th Cir. 1998) (motion).

24 Thus, to the extent Plaintiff’s Complaint and his attached affidavit are based on personal
 25 knowledge and set forth specific facts admissible in evidence, they may be considered as
 26 opposing affidavits under FED.R.CIV.P. 56(e); *Schroeder*, 55 F.3d at 460; *see also California*
 27 *Pro-Life Council v. Randolph*, 507 F.3d 1172, 1176 (9th Cir. 2007) (“A verified complaint may
 28 serve as an affidavit for purposes of summary judgment if [1] it is based on personal knowledge

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 3 and if [2] it sets forth the requisite facts with specificity.'") (quoting *Moran v. Selig*, 447 F.3d
 4 748, 760 n.16 (9th Cir. 2006) (citation omitted)).

5 **D. Defendants' Arguments**

6 Defendant seeks to dismiss some of Plaintiff's claims as a matter of law pursuant to
 7 FED.R.CIV.P. 12(b)(6), and a summary judgment pursuant to FED.R.CIV.P. 56 as to others. First,
 8 Defendant Costa seeks to dismiss Plaintiff's common law tort claims for intentional infliction
 9 of emotional distress and negligence for failing to state a claim pursuant to FED.R.CIV.P.
 10 12(b)(6) on grounds that: 1) he is statutorily immune under the Federal Employees Liability and
 11 Tort Compensation Act ("FELRTCA") (Def.'s P&A's in Supp. of Mot. [Doc. No. 9-2] at 9-10);
 12 2) to the extent Plaintiff's tort claims may be construed against the United States under the
 13 Federal Tort Claims Act, 28 U.S.C. § 2679(d)(1), they are pre-empted by the Inmate Accident
 14 Compensation Act, 18 U.S.C. § 4126, (*id.* at 10-11); and 3) a civil rights action may not be
 15 brought against a federal actor pursuant to 42 U.S.C. § 1983. (*Id.* at 12.)

16 Defendant Costa further seeks summary judgment pursuant to FED.R.CIV.P. 56 on
 17 grounds that: 1) to the extent Plaintiff's medical care claims arise under *Bivens v. Six Unknown
 18 Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), no evidence in the
 19 record shows Costa was personally involved in providing Plaintiff any constitutionally
 20 inadequate medical care, (*id.* at 12-14); 2) he is entitled to qualified immunity as to any damages
 21 Plaintiff seeks because no genuine issues of material fact exist to show that Costa was
 22 deliberately indifferent to Plaintiff's medical needs (*id.* at 14-18), and the "application of the
 23 Fifth Amendment to the circumstances presented was not clearly established at the time of
 24 Plaintiff's injury." (*Id.* at 18-19.)

25 As noted previously, Plaintiff has not opposed Defendant's Motion; however, to the
 26 extent his Complaint and affidavit attached comply with 28 U.S.C. § 1746, they will be
 27 construed as opposing affidavits under FED.R.CIV.P. 56(e); *Schroeder*, 55 F.3d at 460;
 28 *California Pro-Life Council*, 507 F.3d at 1176.

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3 **1. Common Law Tort Claims**

4 **a. Statutory Immunity under FELRTCA**

5 Defendant Costa first claims immunity from Plaintiff's state law tort claims for alleged
6 acts of negligence and the intentional infliction of emotional distress because as a federal
7 employee acting within the scope of his employment, the Federal Employees Liability Reform
8 and Tort Compensation Act (FELRTCA) acts as a bar to Plaintiff's claims. (Defs.'s P&A's in
9 Supp. of Mot. [Doc. No. 9-2] at 9-10.)

10 The Federal Tort Claims Act (FTCA) authorizes "claims against the United States, for
11 money damages ... for injury or loss of property ... caused by the negligent or wrongful act or
12 omission of any employee of the Government while acting within the scope of his office or
13 employment." 28 U.S.C. § 1346(b)(1). *Ali v. Federal Bureau of Prisons*, 522 U.S. 831, 835
14 (2008). While Plaintiff has not expressly named the United States as a Defendant in this action,
15 and a FTCA claim may not be brought against a federal employee in his official capacity, *see*
16 *United States v. Johnson*, 481 U.S. 681, 700 (1987) ("[L]iability under the FTCA is imposed
17 upon the Government, and not upon individual employees."), the FELRTCA, also known as the
18 Westfall Act,² makes the FTCA the exclusive remedy for any "for injury or loss of property, or
19 personal injury ... arising or resulting from the negligent or wrongful act or omission of any
20 employee of the Government while acting within the scope of his office or employment." 28
21 U.S.C. § 2679(b)(1). *See Osborn v. Haley*, 549 U.S. 225, 237 (2007) (describing the Westfall
22 Act as "a measure designed to immunize covered federal employees not simply from liability,

24 ² The Westfall Act was enacted in response to *Westfall v. Erwin*, 484 U.S. 292 (1988). In
25 *Westfall*, the Supreme Court held that the judicially created doctrine of official immunity did not provide
26 absolute immunity to Government employees for torts committed in the scope of their employment.
27 *United States v. Smith*, 499 U.S. 160, 162 (1991). Instead, the Supreme Court ruled that such official
28 immunity required a case-by-case determination, dependent on whether "the contribution to effective
 government in particular contexts" from granting immunity "outweighs the potential harm to individual
 citizens." *Id.* at 162 (citing *Westfall*, 484 U.S. at 299). In response to *Westfall*, Congress enacted the
 FELRTCA to establish an absolute immunity for Government employees that the Court declined to
 recognize under the common law in *Westfall*. "The Act confers such immunity by making an FTCA
 action against the Government the exclusive remedy for torts committed by Government employees in
 the scope of their employment." *Smith*, 499 U.S. at 162-63.

1 but from suit.”) (internal citations omitted); *Pelletier v. Federal Home Loan Bank of San*
 2 *Francisco*, 968 F.2d 865, 873-74 (9th Cir. 1992).

3 Thus, if the United States Attorney certifies that the employee was acting within the scope
 4 of his or her employment at the time Plaintiff was injured, the United States is substituted as the
 5 defendant in the action, and the FELRTCA “acts as a general grant of immunity [from suit] to
 6 [the] government employee for all such acts.” *Casteneda v. United States*, 546 F.3d 682, 695
 7 (9th Cir. 2008), *cert. granted sub. nom.*, *Migliaccio v. Castaneda*, __S.Ct. __, 2009 WL
 8 1649115, 77 USLW 3692 (U.S. Sep. 30, 2009) (No. 08-1529) (citing 28 U.S.C. § 2679(d)(1)).

9 Here, the United States Attorney has certified pursuant to 28 U.S.C. § 2679(d) and 28
 10 C.F.R. § 15.3, that “United States Bureau of Prisons (“BOP”) Correctional Officer Kevin Costa
 11 (incorrectly named as “Officer Costas”) ...was acting within the scope of his employment as a
 12 BOP employee, with regard to the events described in Plaintiff’s Complaint.” (Def.’s Ex. V.)
 13 Thus, Plaintiff’s state law tort claims based on negligence and the intentional infliction of
 14 emotional distress, whether they arise from the circumstances surrounding Plaintiff’s initial
 15 injury on August 11, 2005 or his medical care afterward, may not proceed against Defendant
 16 Costa. *Castaneda*, 546 F.3d at 695-96. Pursuant to 28 U.S.C. § 2679(d)(1), the United States
 17 is substituted as defendant, and Plaintiff’s state-law tort claims “fall[] under the governance of
 18 the Federal Tort Claims Act.” *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 420 (1995).

19 Accordingly, the Court GRANTS Defendant Costa’s Motion to Dismiss Plaintiff’s state
 20 law tort claims as precluded by the FELRTCA.

21 **b. Pre-emption under Inmate Accident Compensation Act**

22 Defendant also seeks dismissal of Plaintiff’s claims under the FTCA on grounds that they
 23 are pre-empted by the Inmate Accident Compensation Act, 18 U.S.C. § 4126. (See Def.’s
 24 P&A’s in Supp. of Mot. at 10-11.) The Court agrees.

25 The FTCA “was designed to remove the sovereign immunity of the United States from
 26 suits in tort and, with certain specific exceptions, to render the Government liable in tort as
 27 private a individual would be in like circumstances.” *Sosa v. Alvarez-Machain*, 542 U.S.
 28 692,700 (2004) (internal citation omitted); *see also* 28 U.S.C. § 1346(b). The Inmate

1 Compensation Act, 18 U.S.C. § 4126, is one of those exceptions in that it provides an alternate
 2 exclusive means by which a federal prisoner injured on the job may recover for work-related
 3 injuries through the Prison Industries Fund. *See United States v. Demko*, 385 U.S. 149 (1966);
 4 *Vander v. U.S. Dep’t of Justice*, 268 F.3d 661 (9th Cir. 2001); 18 U.S.C. § 4126(c)(4); 28 C.F.R.
 5 § 301.301(b); *see also Paschal v. United States*, 302 F.3d 768, 769 (7th Cir. 2002) (finding that
 6 18 U.S.C. § 4126(c), providing exclusive remedy for federal inmates injured while working,
 7 applies to federal prisoners and pretrial detainees alike).

8 In *Demko*, a federal prisoner received compensation under 18 U.S.C. § 4126. *Demko*, 385
 9 U.S. at 149. He later brought suit in federal court under the FTCA, alleging that his injury was
 10 due to the government’s negligence. *Id.* at 150. However, the Supreme Court held that the
 11 Demko’s recovery under Prison Industries Fund was his exclusive remedy, further noting that
 12 18 U.S.C. § 4126 is “an adequate substitute for a system of recovery by common-law torts.” *Id.*
 13 at 153.

14 The Ninth Circuit has similarly refused to allow a federal prisoner to proceed in a suit
 15 under the Federal Tort Claims Act for work-related injuries. *Vander*, 268 F.3d at 663. In
 16 *Vander*, a federal prisoner alleged, like Plaintiff here, that he had a pre-existing knee injury
 17 which he strained while working on a prison work detail and which he claimed was exacerbated
 18 when prison officials acted negligently by delaying medical treatment. *Id.* Relying on
 19 *Demko*, the Ninth Circuit found Vander’s claims barred under the FTCA because 18 U.S.C. §
 20 4126 provides the exclusive remedy for work-related injuries. *Id.* at 663-64. The Court
 21 expressly found that claims related to injuries that are exacerbated as a result of prison officials’
 22 negligent treatment are also barred if the cause of the original injury is work-related. *Id.* at 663-
 23 64; *see also* 28 C.F.R. § 301.301(b) (“Compensation may ... be paid for work-related injuries or
 24 *claims alleging improper medical treatment of a work-related injury.*”)

25 Plaintiff’s case is indistinguishable from *Vander*. Like *Vander*, Plaintiff had a pre-
 26 existing injury which was further aggravated as a result of an on-the-job kitchen accident at
 27 MCC. (Compl. at 3.) Plaintiff also claims, like *Vander*, to have been denied proper medical
 28 treatment as a result of the kitchen injury. (*Id.*) Thus, because Plaintiff suffered a work-related

1 injury, an FTCA action is barred by 18 U.S.C. § 4126(c) and the regulations thereunder. *Vander*,
 2 268 F.3d at 664; *Demko*, 385 U.S. at 152 (noting nothing in legislative history of FTCA suggests
 3 Congress' intent to supplement tort recovery for prisoners already protected by 18 U.S.C.
 4 § 4126).

5 Accordingly, the Court GRANTS Defendant's Motion to Dismiss Plaintiff's state law
 6 tort claims under the FTCA as pre-empted by 18 U.S.C. § 4126.

7 **2. Constitutional Torts**

8 **a. *Bivens* not 42 U.S.C. § 1983**

9 Defendant also moves to dismiss Plaintiff's Complaint to the extent he alleges the
 10 violation of his Eighth Amendment right to be free from cruel and unusual punishment and seeks
 11 relief pursuant to the Civil Rights Act, 42 U.S.C. § 1983.³ (Def.'s P&A's in Supp. of Mot. at 12;
 12 Compl. at 1, 4.)

13 Defendant is correct: section 1983 requires allegations of a constitutional violation by
 14 a person acting under color of state, not federal law. *See* 42 U.S.C. § 1983; *Morse v. North*
 15 *Coast Opportunities, Inc.*, 118 F.3d 1338, 1343 (9th Cir. 1997) ("[B]y its very terms, § 1983
 16 precludes liability in federal government actors."). However, because Plaintiff is proceeding
 17 pro se, the Court construes his Complaint to arise under *Bivens*, the "federal analog to suits
 18 brought under ... 42 U.S.C. § 1983." *Iqbal*, 129 S.Ct. at 1948 (citing *Hartman v. Moore*, 547
 19 U.S. 250, 254 n.2 (2006)). *Bivens* "established that the victims of a constitutional violation by
 20 a federal agent have a right to recover damages against the official in federal court despite the
 21 absence of any statute conferring such a right." *Carlson v. Green*, 446 U.S. 14, 18 (1980); *see*

23
 24 ³ Plaintiff also alleges Defendant Costa committed "serious felon[ies]" in violation of the
 25 California Penal Code. (Compl. at 4.) While Defendant does not address this assertion, the Court
 26 hereby dismisses them *sua sponte* pursuant to 28 U.S.C. § 1915(e)(2), as there is no question that
 27 Plaintiff has no private cause of action for violations of state criminal laws under § 1983 or *Bivens*. *See*
 28 *Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 370 (9th Cir. 1996) (explaining that a violation of state
 law may not form the basis of a section 1983 action); *Ellis v. City of San Diego*, 176 F.3d 1183, 1189-90
 (9th Cir. 1999) (affirming dismissal of alleged violations of 16 sections of the California Penal Code
 and one violation of the California Health and Safety Code on grounds that "these code sections do not
 create enforceable individual rights."); *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc)
 (court must *sua sponte* dismiss any civil action brought pursuant to 28 U.S.C. § 1915(a), which is
 frivolous, malicious, fails to state a claim, or seeking damages from defendants who are immune).

1 also *Vaccarro v. Dobre*, 81 F.3d 854 (9th Cir. 1996) (holding that 18 U.S.C. § 4126 does not bar
 2 a *Bivens* claim).

3 ///

4 To state a private cause of action under *Bivens*, Plaintiff must allege: (1) the violation of
 5 a right secured by the Constitution of the United States, and (2) that the alleged deprivation was
 6 committed by a federal actor. *See Van Strum v. Lawn*, 940 F.2d 406, 409 (9th Cir. 1991) (§ 1983
 7 and *Bivens* actions are identical save for the replacement of a state actor under § 1983 by a
 8 federal actor). In this case, Plaintiff claims Defendant Costa, while acting under color of federal
 9 law, violated his Eighth Amendment right to be free from cruel and unusual punishment by
 10 delaying his access to medical care. (Compl. at 4, 8-9.)

11 **b. Personal Liability and Causation**

12 Even if construed to arise under *Bivens*, Defendant Costa seeks dismissal of Plaintiff's
 13 Eighth Amendment claims⁴ on grounds that Plaintiff has failed to adequately allege Costa was
 14 either personally involved in providing or failing to provide Plaintiff medical care or otherwise
 15 caused Plaintiff's injury. (Def.'s P&A's in Supp. of Mot. at 12-14.)

16 “Because vicarious liability is inapplicable to *Bivens* and § 1983 suits, a plaintiff must
 17 plead that each Government-official defendant, through the official's own individual actions, has
 18 violated the constitution.” *Iqbal*, 129 S.Ct. at 1948. Like all other facts on a motion to dismiss,
 19 facts alleging causation are presumed to be true. *See Twombly*, 550 U.S. at 556. And “[w]hile
 20 legal conclusions can provide the framework of a complaint, they must be supported by factual
 21 allegations.” *Iqbal*, 129 S.Ct. at 1950. If this “factual content, and reasonable inferences from
 22 that content ... are plausibly suggestive of a claim entitling the plaintiff to relief,” the complaint
 23 will survive a motion to dismiss it. *Moss*, 572 F.3d at 969.

24 A person deprives another of a constitutional right where that person “does an affirmative
 25 act, participates in another's affirmative acts, or omits to perform an act which [that person] is

26 ⁴ Because Plaintiff was a federal pretrial detainee, and not a convicted prisoner at the time he
 27 was injured, (see Def.'s Ex. C), it is the Fifth Amendment's due process clause, and not the Eighth
 28 Amendment, which applies. *Graham v. Connor*, 490 U.S. 386, 395 n.10 (1989) (“The Due Process
 Clause protects a pretrial detainee from ... punishment.” (citing *Bell v. Wolfish*, 441 U.S. 520, 535-539
 (1979)).

1 legally required to do that causes the deprivation of which the complaint is made.” *Johnson v.*
 2 *Duffy*, 588 F.2d 740, 743 (9th Cir. 1978)). Indeed the “requisite causal connection can be
 3 established not only by some kind of direct personal participation in the deprivation, but also by
 4 setting in motion a series of acts by others which the actor knows or reasonably should know
 5 would cause others to inflict the constitutional injury.” *Id.* at 743-44; *see also Kwai Fun Wong*
 6 *v. United States*, 373 F.3d 952, 966 (9th Cir. 2004)).

7 In his Complaint, Plaintiff alleges Costa as “supervisor” of the MCC kitchen
 8 “substantially abused [his] authority by denying ... Plaintiff for medical attention,” and that he
 9 has suffered “unimaginable pain, sleepless nights, severe mental anguish, verbal abuse[],
 10 emotional distress and [a] series of surgeries as the result of the denial of medical attention.”
 11 (Compl. at 3.) In the affidavit submitted in support of his Complaint, Plaintiff specifically
 12 alleges only that after he was injured in the kitchen on August 11, 2005, Defendant Costa told
 13 him to sit, that his hand was not “falling [off],” and that he would “bring [Plaintiff] to the Dr.
 14 when [he] fel[t] like it.” (*Id.* at 8.) Plaintiff thereafter claims to have waited from 2 hours in
 15 the kitchen before “Costa[] finally transferred [him] to the medical floor.” (*Id.* at 9.)

16 Once in the infirmary, Plaintiff claims to have “waited another two (2) hours and thirty
 17 minutes,” before having his wounds treated. (*Id.*) Plaintiff also claims to have been denied
 18 medical attention for 21 days after the August 11th incident, “despite [] everyday begging for
 19 medical attention.” (*Id.* at 4.) Critically, however, Plaintiff does not identify the person or
 20 persons to whom his entreaties were directed nor by whom they were denied. In fact, the only
 21 other mention of Defendant Costa involves an elevator malfunction on August 17, 2005, and
 22 Costa’s failure to “use the radio in his possession to get help.” (*Id.* at 9.) Nowhere in his
 23 Complaint, affidavit, or in the exhibits attached to Plaintiff’s Complaint, is Defendant Costa
 24 alleged to have been directly or indirectly involved in either providing or failing to provide
 25 Plaintiff with medical care.

26 Thus, in this case, the Court finds Plaintiff has failed to plead sufficient factual content
 27 to support his conclusory claim that Costa’s initial response to Plaintiff’s injury on August 11,
 28 2005 caused a violation of his constitutional rights. *See Iqbal*, 129 S. Ct. at 1948 (“Threadbare

1 recitals of the elements of a cause of action, supported merely by conclusory statements,” are
 2 insufficient to survive a motion to dismiss); *Johnson*, 588 F.2d at 743; *McGuckin v. Smith*, 974
 3 F.2d 1050, 1059-60 (9th Cir. 1992), *overruled on other grounds by WMX Techs., Inc. v. Miller*,
 4 104 F.3d 1133 (9th Cir. 1997) (en banc) (mere delay in treatment does not constitute a violation
 5 of the Eighth Amendment, unless the delay or denial was harmful).

6 The Court further finds Plaintiff has failed to provide sufficient factual content that might
 7 plausibly suggest it was reasonably foreseeable to Costa that his actions in the kitchen on August
 8 11, 2005 would lead to any further injury. *See Gini v. Las Vegas Metro. Police Dep’t*, 40 F.3d
 9 1041, 1044 (9th Cir. 1994) (where official did not directly cause a constitutional violation,
 10 plaintiff must show the violation was reasonably foreseeable to him); *see also Hunt v. Dental*
 11 *Dep’t*, 865 F.2d 198, 200 (9th Cir. 1989) (finding prison official who “played [no] role in
 12 denying [plaintiff] medical care” “c[ould not] be held vicariously liable for the fault of [medical]
 13 personnel at [the prison].”)

14 Thus, the Court GRANTS Defendant Costa’s Motion to Dismiss Plaintiff’s constitutional
 15 claims against Defendant Costa on grounds because Plaintiff has failed to plead enough facts to
 16 state a constitutional claim for relief which is “plausible on its face.” *Iqbal*, 129 S.Ct. at 1949;
 17 *Twombly*, 550 U.S. at 570; *Moss*, 572 F.3d at 969.

18 **c. Qualified Immunity**

19 Finally, Costa seeks summary judgment arguing that even if Plaintiff’s Complaint alleges
 20 facts sufficient to state a constitutional claim, he is qualifiedly immune because no evidence in
 21 the record shows he acted with deliberate indifference to Plaintiff’s serious medical needs, or
 22 that he violated a clearly established law. (Def.’s P&A’s in Supp. of Mot. at 14-19.)

23 “Government officials enjoy qualified immunity from civil damages unless their conduct
 24 violates ‘clearly established statutory or constitutional rights of which a reasonable person would
 25 have known.’” *Jeffers v. Gomez*, 267 F.3d 895, 910 (9th Cir. 2001) (quoting *Harlow v.*
 26 *Fitzgerald*, 457 U.S. 800, 818 (1982)). When presented with a qualified immunity defense, the
 27 central questions for the court are: (1) whether the facts alleged, taken in the light most
 28 favorable to Plaintiff, demonstrate that the Defendant’s conduct violated a statutory or

1 constitutional right; and (2) whether the right at issue was “clearly established” at the time it is
 2 alleged to have been violated. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Although *Saucier*
 3 originally required the Court to answer these questions in order, the U.S. Supreme Court has
 4 recently held that “while the sequence set forth there is often appropriate, it should no longer be
 5 regarded as mandatory.” *Pearson v. Callahan*, ___ U.S. ___, 129 S.Ct. 808, 818 (2009).

6 If the Court finds that Plaintiff’s allegations do not make out a statutory or constitutional
 7 violation, “there is no necessity for further inquiries concerning qualified immunity.” *Saucier*,
 8 533 U.S. at 201. Similarly, if the Court determines that the right at issue was not clearly
 9 established at the time of the defendant’s alleged misconduct, the court may end further inquiries
 10 concerning qualified immunity without determining whether the allegations in fact make out a
 11 statutory or constitutional violation. *Pearson*, 129 S.Ct. at 818.

12 As noted above, Plaintiff’s constitutional claims against Defendant Costa are rooted in
 13 the Fifth Amendment’s Due Process clause, not the Eighth Amendment’s prohibition on cruel
 14 and unusual punishment. *Castaneda*, 546 F.3d at 688 n. 6 (citing *Bell v. Wolfish*, 441 U.S. 520,
 15 536-37 & n.16 (1979)); *Conn v. City of Reno*, 572 F.3d 1047, 1054 (9th Cir. 2009) (the Eighth
 16 Amendment and substantive due process guarantee that “inmates and detainees receive
 17 constitutionally adequate medical and mental health care.”).

18 However, “[w]ith regard to medical needs, the due process clause imposes, at a minimum,
 19 the same duty the Eighth Amendment imposes.” *Gibson v. County of Washoe*, 290 F.3d 1175,
 20 1187 (9th Cir. 2002); *Gary H. v. Heggstrom*, 831 F.2d 1430, 1432 (9th Cir. 1987) (the Due
 21 Process Clause “implicitly incorporates the cruel and unusual punishments clause standards”).

22 The Eighth Amendment protects inmates from cruel and unusual punishment, which
 23 includes the denial of medical care. *Estelle v. Gamble*, 429 U.S. 97, 102-03 (1976). If an
 24 official is deliberately indifferent to a “substantial risk of serious harm to an inmate—including
 25 the deprivation of a serious medical need”— he violates the Eighth Amendment, as well as the
 26 Due Process Clause. *Conn*, 572 F.3d at 1054-55 (citing *Farmer v. Brennan*, 511 U.S. 825, 828
 27 (1994)).

28

1 Thus, to set forth a constitutional claim predicated upon the failure to provide medical
 2 treatment,

3 [f]irst, the plaintiff must show a “serious medical need” by
 4 demonstrating that “failure to treat a prisoner’s condition could
 5 result in further significant injury or the ‘unnecessary and wanton
 6 infliction of pain.’” Second, the plaintiff must show the defendant’s
 7 response to the need was deliberately indifferent.

8 *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006) (internal citations omitted). The second
 9 prong requires both “(a) a purposeful act or failure to respond to a prisoner’s pain or possible
 10 medical need and (b) harm caused by the indifference.” *Id.* Deliberate indifference thus requires
 11 an objective risk of harm and a subjective awareness of that harm. *Farmer*, 511 U.S. at 837;
 12 *Conn*, 572 F.3d at 1055.

13 Here, Defendants have shown no genuine issues of material fact exist to support
 14 Plaintiff’s claims that Defendant Costa denied him adequate medical care. *Celotex*, 477 U.S. at
 15 323. While the evidence in the record does show Plaintiff’s August 11, 2005 kitchen injury, in
 16 light of his pre-existing condition, was sufficiently serious to require some medical attention, *see*
 17 Compl. at 3, 8; Pl.’s Ex. B; Lacy Decl. ¶ 6, Def.’s Exs. F, J, Plaintiff has failed to “present
 18 significant, probative evidence tending to support his allegations,” *Bias*, 508 F.3d at 1218, and
 19 therefore, no rational jury could find Costa acted with “deliberate indifference” in response to
 20 his need. *See Celotex*, 477 U.S. at 323; *Conn*, 572 F.3d at 1055.

21 Specifically, the only evidence pertaining to Defendant Costa and Plaintiff’s injury are
 22 Plaintiff’s sworn allegations that after another co-worker pushed a food cart into his left hand
 23 and thumb, Defendant Costa directed him to sit, downplayed his pain by saying, “Your hand[]
 24 is not yet falling [off],” and told him he would “bring [Plaintiff] to the doctor when he [fe]lt like
 25 it.” (Compl. at 8.) Plaintiff claims he was injured at 11:45 a.m, and to have waited two hours
 26 before Costa transported him to medical, and an additional “two hours and thirty minutes” *after*
 27 he arrived at the infirmary (*id.* at 9); however, the MCC’s medical records report Plaintiff was
 28 injured at 1:30 p.m. and transported to Health Service at 2:40 p.m. (Def.’s Ex. F.) Thus,
 construing this evidence in the light most favorable to Plaintiff, it appears he was required *at*

1 most to have waited almost four hours before being treated in the infirmary. *See* Compl. at 8-9;
 2 *cf.* Def.'s Ex. F.

3 A mere delay in treatment does not constitute a violation of the constitution, unless the
 4 delay was harmful. *See McGuckin*, 974 F.2d at 1060; *Shapley v. Nevada Bd. of State Prison*
 5 *Comm'r's*, 766 F.2d 404, 407 (9th Cir. 1985); *Hunt*, 865 F.2d at 200 ("[D]elay in providing a
 6 prisoner with dental treatment, standing alone, does not constitute an Eighth Amendment
 7 violation."); *see also Sealock v. Colorado*, 218 F.3d 1205, 1210 (10th Cir. 2000) ("Certainly, not
 8 every twinge of pain suffered as the result of delay in medical care is actionable.").

9 In this case, absolutely nothing in the record suggests Defendant Costa acted with
 10 deliberate indifference to Plaintiff's serious medical need *or* that he was harmed by any delay
 11 in getting to Health Services. *See McGuckin*, 974 F.2d at 1060. In fact, Plaintiff's medical
 12 records corroborate both Defendant Costa and Dr. Lacy's assessment of Plaintiff's August 11,
 13 2005 injury as a "non-emergency." *See* Def.'s Exs. F, J; Costa Decl. ¶¶ 9-12; Lacy Decl. ¶ 6.
 14 When Plaintiff arrived at Health Services, Physician's Assistant Camagay noted only minimal
 15 swelling to Plaintiff's left thumb, a limited range of motion, no hematoma and no abrasions.
 16 (Def.'s Ex. F.) Camagay recommended an x-ray, prescribed Plaintiff Ibuprofen or Motrin for
 17 pain and swelling, and classified his injury as requiring only "minor first aid." (*Id.*; *see also*
 18 Def.'s Ex. J.) An x-ray taken later that same day, and another taken on August 26, 2005 revealed
 19 no acute fracture. (Defs.'s Exs. I, N; Lacy Decl. ¶ 6.) And, while Plaintiff later developed and
 20 was treated for an infection, (Def.'s Exs. K-M; Lacy Decl. ¶ 8), and on October 5, 2005, received
 21 orthopedic surgery on his hand in order to repair nerve damage and scarring which Dr. Otero
 22 attributed to "multiple past surgeries and infections," (Lacy Decl. ¶ 13, Def.'s Ex. Q), none of
 23 this evidence shows that Defendant Costa caused either his initial injury—or any additional harm
 24 to him simply by making him wait in the kitchen for a transport officer before releasing him to
 25 Health Services. *See McGuckin*, 974 F.2d at 1059-60; *Shapley*, 766 F.2d at 407; *Wood v.*
 26 *Housewright*, 900 F.2d 1332, 1335-36 (9th Cir. 1990) (finding mere delay in providing medical
 27 treatment, without a showing of resulting harm, insufficient to show deliberate indifference).

28

1 Moreover, the fact that Defendant Costa allegedly made harsh or unsympathetic
 2 “comments” to Plaintiff in the kitchen in response to his pain does not, by itself, rise to the level
 3 of deliberate indifference. *See e.g., Oltarzewski v. Ruggerio*, 830 F.2d 136, 138 (9th Cir. 1987)
 4 (finding claims of verbal harassment or abuse by guards do not state a constitutional
 5 deprivation); *Franklin v. State of Or., State Welfare Div.*, 662 F.2d 1337, 1345 (9th Cir. 1981)
 6 (noting that prisoners have “no constitutional right not to be the subject of swearing”); *Toguchi*
 7 *v. Chung*, 391 F.3d 1051, 1060 (9th Cir. 2004) (“Deliberate indifference is a high legal
 8 standard.”).

9 Thus, because the Court finds the evidence, when viewed in the light most favorable to
 10 Plaintiff, reveals no genuine issues of material fact as to Plaintiff’s inadequate medical care
 11 claim against Defendant Costa, it need not further determine whether Costa is also entitled to
 12 qualified immunity because the law was not “clearly established.” *Saucier*, 533 U.S. at 201 (“If
 13 no constitutional right would have been violated were the allegations established, there is no
 14 necessity for further inquiries concerning qualified immunity.”); *Pearson*, 129 S. Ct. at 818
 15 (“The judges of the district courts and the courts of appeals should be permitted to exercise their
 16 sound discretion in deciding which of the two prongs of the qualified immunity analysis should
 17 be addressed first in light of the circumstances in the particular case at hand.”).

18 Accordingly, Defendant Costa’s Motion for Summary Judgment as to Plaintiff’s
 19 inadequate medical care claims is GRANTED.

20 **V. Conclusion and Order**

21 For all the reasons set forth herein, the Court:

- 22 1) DISMISSES the action as to Defendants MCC and John Does 1-10 for failure to
 prosecute and for lack of personal jurisdiction pursuant to FED.R.CIV.P. 4(m);
- 23 2) GRANTS Defendant Costa’s Motion to Dismiss Plaintiff’s state law tort claims
 as barred by the FELRTCA;
- 24 3) GRANTS Defendant Costa’s Motion to Dismiss Plaintiff’s state law tort claims
 under the FTCA as pre-empted by 18 U.S.C. § 4126;

- 1 4) GRANTS Defendant Costa's Motion for Summary Judgment as to Plaintiff's
- 2 inadequate medical care claims pursuant to FED.R.CIV.P. 56;
- 3 5) DIRECTS the Clerk of Court to enter judgment for Defendant Costa; and
- 4 6) CERTIFIES that an *informa pauperis* appeal in this matter would *not* be taken in
- 5 good faith. *See* 28 U.S.C. § 1915(a)(3).

6
7 **IT IS SO ORDERED.**

8
9 DATED: November 16, 2009

10 
11 IRMA E. GONZALEZ, Chief Judge
United States District Court

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